

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATION BOARD
REGION 9

FAYETTE COUNTY CHILD DEVELOPMENT, INC. ^{1/}

Employer

and

Case 9-RC-17760

DISTRICT 1199, THE HEALTH CARE AND
SOCIAL SERVICE UNION, SEIU, AFL-CIO ^{2/}

Petitioner

**REGIONAL DIRECTOR'S DECISION AND
DIRECTION OF ELECTION**

The Employer is a non-profit corporation providing developmental education for age and income eligible children. The Petitioner has filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit comprised of all full-time and regular part-time employees, including lead teachers, teachers, teacher aides, home visitors, family service workers, receptionist/secretary, cooks, bus drivers, and custodians working at, or out of, the Employer's 102 Hunter Street, Oak Hill, West Virginia facility, excluding all directors, managers, executive secretary, lead home visitor, confidential employees, and all professional employees, guards and supervisors as defined in the Act. There is no history of collective-bargaining affecting the employees involved in this proceeding.

A hearing officer of the Board held a hearing on the issues raised by the petition and the Employer filed a brief with me. ^{3/} The parties disagree with regard to the unit placement of five lead teachers. The Employer, contrary to the Petitioner, asserts that the lead teachers are supervisors within the meaning of Section 2(11) of the Act should be excluded from the unit. The parties agree that this is the only issue in dispute. The Petitioner has, however, stated a willingness to proceed to an election in a unit excluding the lead teachers if they are found to be supervisors.

I have carefully considered the evidence and the arguments presented by the parties and have concluded, as discussed below, that the lead teachers are supervisors within the meaning of Section 2(11) of the Act and, therefore, must be excluded from the unit. Accordingly, I will exclude the lead teachers from the unit found appropriate.

^{1/} The Employer's name appears as amended at hearing.

^{2/} The Petitioner's name appears as amended at hearing.

^{3/} Although given an opportunity to do so, the Petitioner did not file a post-hearing brief.

To provide a context for my discussion of the issue, I will first provide an overview of the Employer's operations. I will then present, in detail, the facts and analysis that supports each of my conclusions on the issue.

I. OVERVIEW OF OPERATIONS

The Employer is a federally funded grantee agency that is responsible for operating a Head Start program in Fayette County, West Virginia. It provides comprehensive services to age and income eligible children and their families. Pre-school age children from 3 to 5 years old attend the program. Two separate boards, a Board of Directors and a Policy Council, govern the Head Start program. Executive Director Keith Young works out of the Employer's administrative office and is in charge of the day-to-day operations of the Employer. Reporting directly to Young are: Lisa Bowen, health and nutrition specialist; Sandy Williams, family and community partner manager; Charles Evans, transportation and facilities manager; Keith Walker, disability and mental health specialist; Sharon Dean, fiscal specialist; Angela Keffer, early childhood development manager; and Gene Skeldon, executive secretary. All these admitted supervisors work out of the Employer's Oak Hill administrative office. Excluding Fiscal Specialist Dean and Executive Secretary Skeldon, these managers administer Head Start's five service components: health and nutrition, family service, transportation/facilities, disabilities and mental health, and education.

Keffer has immediate responsibility for the Employer's education component and is responsible for the operation of five individual centers (Boomer, Ansted, Page, Fayetteville and Oak Hill), located in Fayette County. The Boomer Center is approximately 26 miles from the administrative office; the Ansted Center is about 21 miles away; the Page center is 9 miles away; and the Fayetteville center is about 7 miles away. The Oak Hill Center is in a separate facility adjacent to the administrative office. With the exception of the Oak Hill Center, Keffer visits each of the centers, at most, one or two times a month for about an hour or two at a time. Keffer visits the Oak Hill Center, which is located next door to the administrative offices, for a similar period of time about once a week. While at the centers she observes the staff in the performance of their duties to ensure compliance with the performance standards required by the Federal Government.

The Boomer Center has two classrooms. Pre-school age children attend classes between the hours of 9 a.m. and 2 p.m., Monday through Friday. Lead Teacher Elizabeth Walker and a teacher's aide work in one classroom and a teacher and another teacher's aide work in the other classroom. The center also has a cook, two bus drivers, and a custodian. Family service workers are in the center three days a week.

The Ansted Center also has two classrooms that operate Monday through Friday which are staffed in the same manner as the Boomer Center. Children attend the Ansted classes between the hours of 9 a.m. and 1 p.m. Teresa "Kim" Hatcher is the lead teacher at the Ansted Center. In addition to the teachers and their aides, the staff at Ansted includes a cook, two bus drivers, two home visitors who check in and out of the center, and a family service worker who

reports to the center three days a week. The home visitors report to Lead Home Visitor Donita Woodson.^{4/}

The Fayetteville Center has three classrooms, two of which offer the center-based program 9 a.m. to 3 p.m., Monday through Friday, and one of which offers a combination-based program two days a week, on Tuesdays and Wednesdays. The combination classroom is also used as a socialization room every other Thursday. The combination program offers qualified families and children a mix of home and center based services. Lead Teacher Benita Bickford and a teacher's aide work out of one center-based classroom and a teacher and another aide work out of the other center-based classroom. Two teachers work in the combination classroom and a home visitor operates the socialization classroom every other Thursday. The Fayetteville staff also includes a cook, two bus drivers, and an additional driver who drives when the combination and socialization classroom is open.

The Page Center also has three classrooms, one of which is a socialization classroom that is run by home visitors twice a week. The center-based classrooms operate from 9 a.m. to 3 p.m., Monday through Friday. Lead Teacher Claudia Davis and a teacher's aide work in one classroom and a teacher and another aide work in another classroom. The Page staff also includes a janitor, two bus drivers, and a cook.

The Oak Hill Center has two classrooms in which classes are held from 9 a.m. to 2 p.m., Monday through Friday. Lead teacher Nicole Preast and a teacher's aide work out of one classroom and a teacher and another aide work out of the other classroom. The remaining staff at Oak Hill consists of a cook, custodians, and two bus drivers. Additionally, a family service worker, who primarily works out of the administrative office, occasionally works at Oak Hill.

II. LEAD TEACHERS

The record discloses that all lead teachers have similar duties and responsibilities. They report to and receive instructions from Keffer. The lead teachers spend most of their workdays in a classroom teaching and working with preschoolers. The teachers and teacher's aides who work in each center spend the same amount of time in the classroom as do the lead teachers. All classroom teaching focuses on ten federally mandated learning measurements known as "Kim's Measures." The measurements include learning at least ten letters of the alphabet, learning to count to ten, color recognition, body part recognition, social/emotional development, and physical development such as learning to run, jump, hop and kick.

An hour before class and another hour following class, lead teachers and teachers perform various administrative tasks, including preparing lesson plans, setting up learning centers for the days' activities, and responding to parental questions and concerns. The teaching staff must complete and submit their lesson plans to Keffer 2 weeks in advance. Lead teachers do not review lesson plans prior to submission, although they may review them after submission to ensure that all of the required components of the education program are included.

^{4/} The Petitioner has not sought Woodson's inclusion in the unit and the Employer maintains that she is a statutory supervisor. Accordingly, I will exclude her from the unit.

Keffer testified that lead teachers spend a “significant amount of time” performing duties specific to their role as a lead teacher. Lead Teacher Nicole Preast estimated that 90 to 95 percent of her workday is spent performing the same duties a teacher performs. However, the lead teachers perform a number of specific duties that distinguish them from the other teachers. For example, lead teachers prepare employee evaluations, monitor teaching and kitchen staff for compliance with applicable standards, approve menu substitutions in conformity with USDA requirements, handle and forward correspondence from Keffer, and review for accuracy and forward employee time sheets. Moreover, lead teachers are responsible for monitoring staff attendance at their respective centers and for disciplinary employees.

Time sheets for all the employees employed at the respective centers are submitted to the lead teacher at each center. Lead teachers make changes to submitted time records when they believe that the records are inaccurate. Following review, the lead teachers submit the time sheets to Keffer.

Lead teachers are also required to ensure that a proper adult/child ratio is maintained at all times. In this regard, lead teachers have the authority to deny or revoke a staff person’s leave request if the lead teacher is unable to obtain sufficient alternative coverage to maintain the federally mandated adult/child ratio. Lead teachers may authorize teachers, teachers’ aides, and cooks to take accumulated leave up to three days at a time. The executive director must authorize extended leave requests.

Lead teachers cannot authorize overtime hours as the Head Start program does not authorize funding for the use of overtime. Additionally, lead teachers cannot extend or change employees’ hours of work. Lead teachers open and close the centers and are generally the only employees at the centers who have keys. The exception is when the lead teacher lives at a great distance from her respective center and a key must also be left with a staff person who lives nearby.

Lead teachers are responsible for the day-to-day operations of their respective centers. Thus, the Employer’s Management Guide specifies that they are, “directly responsible for the supervision, discipline, evaluation and coaching of staff in the center.” With regard to supervision, the record discloses that the lead teachers directly supervise the teachers, teacher’s aides, and cooks. Thus, they monitor each in the performance of their respective duties and may assign them to perform tasks beyond those that they normally perform. For example, lead teachers have sent children home early to allow center staff to prepare for a federal review and center staff members have been required to clean a storage room and to clean up their center in preparation for a federal review of the program. The lead teachers also may assign a bus driver or custodian to cover a classroom, as needed, to ensure that the proper adult/child ratio is maintained. However, Transportation and Services Manager Evans is the direct supervisor of the drivers and custodians and is responsible for those employees, including issuance of discipline to them.

Lead teachers are required to ensure that general building maintenance is maintained and that the play area is kept in good condition. In the kitchen, the lead teachers ensure that cooks comply with all USDA guidelines. In the event of inclement weather a lead teacher can close her respective center and send children home for the day. Lead teachers cannot, however, authorize staff to stay home or go home because of inclement weather. Rather, staff must remain and

complete their regularly scheduled workday or take annual leave if they have it available, unless the executive director authorizes leave. Lead teachers may send staff home in emergency situations such as when there is a gas leak at a center.

Lead teachers evaluate teachers, teacher's aides, and cooks in their respective centers on an annual basis each March. These written evaluations do not directly affect pay and benefits. However, employees who receive unsatisfactory evaluations may not receive desired promotions and could subject themselves to termination. Nevertheless, the record does not contain any examples of adverse actions resulting from unsatisfactory evaluations among permanent employees.

Lead teachers also prepare written evaluations for probationary employees who work in their respective centers as teachers, aides, and cooks. Like the annual evaluations prepared for permanent employees, the lead teachers prepare these evaluations on their own and submit them to Keffer without prior review or input from her or from any other admitted supervisor. Probationary employees are evaluated on a 30, 60, and 90-day basis. Their job performance is evaluated under the following categories: attitude, knowledge of job, work habits, quality of work, dependability, employee and public contacts, and supervision. Additionally, lead teachers are required to indicate whether the teachers, aides, and cooks meet, exceed, or do not meet the expectations of their respective positions.

With the 90-day evaluation, lead teachers are required to make a recommendation on whether the employee will be hired permanently or dismissed. The record establishes that lead teachers' recommendations with regard to probationary employees have been consistently followed. In this regard, nearly all of the final evaluations and recommendations for probationary employees have been positive and in those cases offers of permanent employment have been extended to employees. Lead Teacher Claudia Davis testified, however, that she wrote a negative evaluation for an employee who did not like taking orders from her and as a result that employee was not permanently retained. Davis evaluated another employee at the end of 60 days and indicated that the employee had not met the expectations of the position. Prior to issuing an unfavorable 90-day evaluation for the same employee, Davis and the family and community partner manager met with the employee and gave her the option of resigning her position rather than being terminated. The employee availed herself of the resignation option. Keffer presents lead teacher's evaluations of probationary employees to the Employer's board generally without comment. As the lead teachers work with these employees on a daily basis, the evaluations and included recommendations are determinative in whether the Employer's board offers permanent employment or terminates a particular probationary employee.

The Employer has a progressive disciplinary procedure that provides for a oral warning, written warning, employee improvement plan (EIP), suspension, and discharge. With regard to teaching staff, lead teachers have the authority to issue oral and written reprimands, to establish and place education employees on employee improvement plans (EIPs), and to recommend suspensions in situations where the offense is obvious and does not require investigation. However, the record shows that no lead teacher has recommended suspensions in the approximate two-year period preceding the hearing in this matter. The lead teachers have issued oral reprimands on a number of occasions and have routinely done so without prior consultation with an admitted supervisor. Additionally, lead teachers have issued written warnings to employees, again, without prior consultation or approval from admitted supervisory personnel.

In fact, admitted supervisors have instructed lead teachers that they are authorized to issue oral and written warnings, and EIPs without consulting with higher authority.

Although the Employer's Personnel Policy and Procedures manual provides for specific disciplinary action in the case of certain conduct, the record discloses that the lead teachers have exercised discretion in determining what type of discipline an employee should receive. Keffer testified that the specific offenses and punishment set forth in the manual merely form guidelines for disciplinary action and that lead teachers have issued more than one oral reprimand for an offense before progressing to a written reprimand. Indeed, the manual itself describes categorized offenses and indicated discipline as guidelines.

Written reprimands issued by lead teachers are forwarded to Keffer, who then places them in employees' personnel files. These warnings may lead to more severe discipline under the Employer's progressive disciplinary policy, including suspension and discharge, if the offending employee commits additional offenses. Employees may also be disciplined if they fail to comply with the performance standards mandated by the Head Start program. The lead teachers monitor these standards for compliance by the staff.

The record contains specific examples of lead teachers issuing oral and written reprimands to employees and evaluating their performance. Thus, Lead Teacher Davis issued an oral warning to an employee who had breached a client's confidentiality. Although not entirely clear from the record, it appears that she may have issued two oral warnings to the same employee for this offense.

Lead teacher Benita Bickford issued an oral reprimand to a teacher in her center and later followed that discipline with a written reprimand. The teacher was given an oral warning for using a cell phone during classroom hours and received a written warning for failing to maintain the required adult/child ratio. The written warning notes that more severe discipline will follow if the teacher fails to correct her conduct.

Lead teacher Elizabeth Walker issued a verbal warning to a teacher's aide who took issue with one of Walker's directives and attempted to have her overruled by Keffer. Keffer apparently instructed the aide to obey Walker and Walker issued a warning to the aide for failing to follow the "chain of command." On another occasion, Walker issued a warning to a cook who failed to use color-coded servers to ensure serving size compliance with USDA guidelines. The same cook received another warning from Walker when she solicited Walker to sign a union authorization card.

Lead teachers are paid more than other teachers. Thus, a starting lead teacher without a bachelor's degree makes \$1.38 an hour more than a starting teacher without a bachelor's degree. A starting lead teacher with a bachelor's degree makes 96 cents an hour more than a starting teacher with a bachelor's degree. As a result of length of service with the Employer, one of the lead teachers' hourly pay rate is more than Keffer's. Lead teachers receive the same benefits as other employees. However, because most lead teachers work two weeks longer each year than the rest of the staff they receive more sick leave and more retirement than do other staff because credit for that time is contributed to them as a percentage of their total earnings.^{5/}

^{5/} Lead Teacher Claudia Davis, a 21-year employee, works year-round.

Lead teachers receive specialized instruction in their duties as leads. New lead teachers train with all the Employer's managers. Thus, lead teachers are instructed in all Head Start components and are told how to complete required paperwork. They also train with disabilities and mental health specialists, the health and nutrition specialist, with Keffer, and receive training on the Employer's policies and procedures from Executive Director Young. In addition, lead teachers report for annual training one week before the start of each term for instruction that focuses on changes in the program and expectations for the year. The lead teachers do not attend management meetings and they cannot assign staff to different centers.

The Employer's records consistently describe lead teachers as supervisors. They are designated as supervisors in the Employer's organization chart. They are also referred to in its' Policy and Procedures Manual as supervisors. Lead teachers sign employee time sheets on the line designated for supervisor, and the job descriptions for lead teachers, teachers, teacher's aides, and cooks, all describe the lead teachers as supervisors. In particular, they are described as the supervisors of the employees employed as teachers, teacher's aides and cooks.

III. THE LAW AND ITS APPLICATION

Before examining the specific duties and authority of the lead teachers, I will review the requirements for establishing supervisory status. Section 2(11) of the Act defines the term supervisor as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To meet the definition of supervisor in Section 2(11) of the Act, a person needs to possess only one of the 12 specific criteria listed, or the authority to effectively recommend such action. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000).

The burden of proving supervisory status lies with the party asserting that such status exists. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-712 (2001); *Michigan Masonic Home*, 332 NLRB No. 150, slip op. at 1 (2000). The Board has frequently warned against construing supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act. See, e.g., *Vencor Hospital – Los Angeles*, 328 NLRB 1136, 1138 (1999); *Bozeman Deaconess Hospital*, 322 NLRB 1107, 1114 (1997). Lack of evidence is construed against the party asserting supervisory status. *Michigan Masonic Home*, supra, slip op. at 1. Mere inferences or conclusionary statements without detailed, specific evidence of independent judgment are insufficient to establish supervisory status. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991).

Possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory status, even if this authority has not yet been exercised. See, e.g., *Pepsi-Cola Co.*, 327 NLRB 1062, 1063 (1999); *Fred Meyer Alaska*, 334 NLRB No. 34, slip op. at 4 n. 8 (2001). The absence of evidence that such authority has been exercised may, however, be probative of whether such authority exists. See, *Michigan Masonic Home*, supra, slip op. at 3; *Chevron U.S.A.*, 308 NLRB 59, 61 (1992).

In considering whether the lead teachers possess any of the supervisory authority set forth in Section 2(11) of the Act, I note that in enacting this section of the Act, Congress emphasized its intention that only supervisory personnel vested with “genuine management prerogatives” should be considered supervisors, and not “straw bosses, leadmen, set-up men and other minor supervisory employees.” *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985). I conclude, for the reasons discussed below, that the five lead teachers in issue here are statutory supervisors and are properly excluded from the unit.

The Employer asserts that the lead teachers possess and exercise many of the indicia of supervisory authority set forth in Section 2(11) of the Act. Thus, the Employer contends that they effectively recommend hiring and firing of employees, effectively recommend promotions for employees, discipline and reward employees, assign and responsibly direct employees, and that they adjust employee grievances. The Employer does not contend, nor does the record reflect, that lead teachers have the independent authority to hire, fire, transfer, layoff, or recall employees. I find, as detailed below, that lead teachers clearly use independent judgment in issuing discipline to employees and that they effectively recommend that probationary employees be permanently retained or terminated based on their evaluation of the work performance of those employees. Accordingly, as the possession of any one of the specific criteria listed in Section 2(11) of the Act is sufficient for a finding of supervisory status, I find it unnecessary to address in detail the other criterion asserted by the Employer to be indicative of supervisory status.

1. Evaluation - Affect on Wages or Job Status

The Board has acknowledged that the authority to “evaluate” is not specifically included among the enumerated indicia of supervisory status set forth in Section 2(11). See, *Williamette Industries, Inc.*, 336 NLRB No. 59 (2002). Accordingly, when “an evaluation does not, by itself, affect the wages and/or job status of the employee being evaluated, the individual performing such an evaluation will not be found to be performing a statutory supervisory function.” *Coventry Health Continuum*, 332 NLRB No. 13, slip op. at 2 (2000); citing, *Elmhurst Extended Care Facilities*, 329 NLRB 535 (1999); *Ten Broeck Commons*, 320 NLRB 806, 813 (1996); *Northcrest Nursing Home*, 313 NLRB 491, 498 at fns. 36 and 37 (1993). However, when evaluations performed by employees in putative supervisory jobs result in personnel action such as discharge, retention, and the grant or denial of raises or bonuses, supervisory status will be found. See, *Bayou Manor Health Center*, 311 NLRB 955 (1993); *Pine Manor Nursing Center*, 270 NLRB 1008, 1009 (1984); *Wedgewood Health Care*, 267 NLRB 525, 526 (1983).

There are two types of evaluations that are performed by the lead teachers; annual evaluations for permanent employees and 30, 60, and 90-day evaluations for probationary employees. The record indicates that evaluations for permanent employees may be taken into account in determining which employees receive desired promotions and unsatisfactory

evaluations may lead to discharge. However, there is no evidence that any permanent employee's job has ever been affected by such an evaluation. In the absence of such evidence, it is uncertain whether statutory supervisory authority would be established by such evaluation. *Manor West, Inc.*, 311 NLRB 655, 663 (1993).

In contrast, however, the evaluations lead teachers perform on probationary employees have direct and tangible consequences to the job status of those employees. Thus, the record establishes that lead teachers perform three evaluations at 30-day intervals on each probationary employee, with the final evaluation being the most significant of the three in terms of its affect on job tenure. At that juncture lead teachers evaluate the probationary employee in each of the categories noted above, make a conclusion as to whether the employee is meeting expectations or not, and make a separate written recommendation that the probationary employee either be permanently hired or dismissed.

Although there are only a few examples of probationary employees receiving negative evaluations and recommendations against continued retention, in all cases the Employer's board of directors has followed the recommendations of the lead teachers. Moreover, the record shows that lead teachers prepare these evaluations on their own and do not receive or seek input from other supervisory personnel regarding the content and conclusions of the evaluations. Additionally, Keffer presents to the Employer's board, without editorial comment, the evaluations prepared by the lead teachers when the question of a probationary employee's employment status is reviewed.

There is no evidence that any of the evaluations performed by lead teachers affect wages. However, the record discloses that the federal government limits funding for merit increases. Under the Employer's current policy employees may only receive "merit" increases based on obtaining a college degree.

Based on the above and the record as a whole, I conclude that lead teachers utilize independent judgment by performing evaluations on employees that affect their job status. The authority to effectively recommend that probationary employees become permanent or are terminated is a significant indicator of supervisory status. Accordingly, I find that the Employer has met its burden of establishing that lead teachers possess and exercise supervisory authority in evaluating probationary employees and I will exclude them lead teachers from the unit as statutory supervisors.

2. Discipline of Employees

It is beyond question that an individual who issues discipline or who effectively recommends discipline of other employees is a supervisor within the meaning of Section 2(11) of the Act. *Sun Refining & Marketing Co.*, 301 NLRB 642, 649, 650 (1991); *JAMCO*, 294 NLRB 896, 900 (1989); *Superior Bakery*, 294 NLRB 256, 262 (1989) However, the putative supervisor's role in the disciplinary process must be more than merely reportorial and the issuance of "minor" discipline such as warnings must tangibly affect employees' job status or tenure before the disputed individual is considered supervisory. See, *Northcrest Nursing Home*, supra at 497; *Ahrens Aircraft, Inc.*, 259 NLRB 839, 842, 843 (1981). Thus, where an admitted statutory supervisor independently reviews disciplinary action, the disputed individual will not

be found supervisory. *Northcrest Nursing Home*, supra, *Knogo Corp.*, 265 NLRB 935, 935 – 936 (1982).

There was consistent testimony in this matter from several witnesses, including lead teachers, that they were told by Keffer that they have independent authority to issue oral and written warnings and EIPs to employees. Moreover, the Employer's personnel manual vests lead teachers as the immediate supervisor, with the authority to issue oral and written warnings. Other official documents, including the management guide and job descriptions state definitively that the lead teachers are the immediate supervisors of the teachers, aides and cooks. Indeed, the record shows that lead teachers have exercised disciplinary authority and have independently issued several oral warnings, at least two written warnings, and an EIP to employees. The record also establishes that the discipline issued by lead teachers is placed in employees' personnel files and is considered when there are additional violations that may warrant more serious disciplinary action. Finally, the record discloses that lead teachers may recommend the suspension of employees, but there is no evidence that this situation has occurred.

Based on the above and the record as a whole, I conclude that lead teachers have the authority to discipline and to effectively recommend the discipline of employees and that under the Employer's progressive disciplinary policy such discipline has a tangible impact on employees' job status. Accordingly, I find that the Employer has satisfied its burden of establishing that the lead teachers possess and exercise the authority to discipline and effectively recommend the discipline of employees and based on their indicia are supervisors within the meaning of Section 2(11) of the Act.

IV. CONCLUSION AS TO LEAD TEACHERS

Because of my findings above, I find it unnecessary to discuss the presence of any other indicia of supervisory status possessed by the lead teachers. However, in addition to the indicia of supervisory status described above, there are other factors that militate toward a finding that the lead teachers are statutory supervisors. Thus, there is some evidence that lead teachers responsibly direct employees in their work and that from time to time they assign them discrete tasks. In the main, however, the employees who are subordinate to the lead teachers perform the same types of duties on a daily basis without the necessity of continual instruction. There are also several secondary indicia of supervisory authority, which favors a finding that lead teachers are supervisors. For example, lead teachers receive a higher rate of pay than other center employees, they are generally the only center employees with keys to the facilities, and they are the only putative supervisors at the centers on a daily basis. This last fact is significant because four of the five centers are located at considerable distances from the Employer's administrative office.

Based on the foregoing, the entire record and having carefully considered the arguments of the parties at the hearing and in the Employer's brief, I find that the lead teachers, Nicole Preast, Claudia Davis, Elizabeth Walker, Teresa "Kim" Hatcher and Benita Bickford, are supervisors within the meaning of Section 2(11) of the Act. Accordingly, I will exclude them from the unit found appropriate.

V. EXCLUSIONS FROM THE UNIT

The parties agree, the record shows, and I find that the following persons are supervisors within the meaning of Section 2(11) of the Act: Keith Young, executive director; Lisa Bowen, health and nutrition specialist; Sandy Williams, family and community partner manager; Charles Evans, transportation and facilities manager; Keith Walker, disability and mental health specialist; Sharon Dean, fiscal specialist; Angela Keffer, early childhood development manager; and Gene Skeldon, executive secretary. Accordingly, I will exclude them from the unit.

VI. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter, and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time employees, teachers, teacher aides, home visitors, family service workers, receptionist/secretary, cooks, bus drivers, and custodians working at, or out of, the Employer's 102 Hunter Street, Oak Hill, West Virginia facility, excluding all directors, managers, executive secretary, lead home visitor, lead teachers, confidential employees, professional employees, guards and supervisors as defined in the Act.

VII. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by District 1199, The Health Care and Social Service Union, SEIU, AFL-CIO. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. VOTING ELIGIBILITY

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. EMPLOYER TO SUBMIT LIST OF ELIGIBLE VOTERS

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **April 9, 2003**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (513) 684-3946. Since the list will be made available to all parties to the election, please furnish **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. NOTICE OF POSTING OBLIGATIONS

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a

minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VIII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EDST on **April 16, 2003**. The request may **not** be filed by facsimile.

Dated at Cincinnati, Ohio this 2nd day of April 2003.

/s/ Richard L. Ahearn

Richard L. Ahearn, Regional Director
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

Classification Index

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